A

WONG KEE CHONG

v.

FOLIN BROTHERS SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[COMPANIES (WINDING-UP) NO: 66-1980]
15 NOVEMBER 2013

C ***COMPANY LAW:*** *Winding-up - Liquidators - Fee - Claim for additional fee - Prolonged liquidation period - Attending to various and protracted legal suits - Whether justified extra fee for 'pain and suffering' - Fee structure under Companies (Winding-Up) Rules 1972 to be adhered to*

D ***COMPANY LAW:*** *Winding-up - Liquidator - Various and protracted legal suits commenced and defended by liquidators - Whether liquidators personally liable for costs of proceedings - Whether liquidators acted reasonably*

E ***COMPANY LAW:*** *Winding up - Stay of winding up order - Application by contributory - Discretion of court to grant stay - Principles for exercise of discretion - Principles similar to annulment of bankruptcy - Whether stay proposed for benefit of creditors - Whether stay conducive to commercial morality and interests of public - Whether any misfeasance*
F *or irregularities occasioned - Stay granted conditional upon payment to creditors and indemnity to Inland Revenue Board and Companies Commission of Malaysia*

The respondent ('Folin Brothers') was wound up on 8 April 1987.
G The contributories (*ie*, the petitioner and his brothers, namely Wong Sin Fan and Wong Kee Sang) in this suit applied for a grant of a permanent stay of the winding up under s. 243 of the Companies Act 1965 ('s. 243'). The joint liquidators of Folin Brothers were Ng Pyak Yeow and Khoo Peng Lai. Folin Brothers'
H sole asset was the shares in Folin Food Processing Sdn Bhd ('Folin Food'). The parties agreed in principle that they will support the contributories' application under s. 243 provided the following matters were addressed: (i) the liquidators' remuneration should be paid; (ii) the fees of the lawyers appointed by the
I liquidators' (past and present) should be paid; and (iii) the creditors of Folin Brothers should be paid. As part of the costs of

winding up, the joint liquidators sought to reclaim from the assets of the company the entirety of the legal fees incurred during their tenure. The liquidators had commenced at their own behest, one suit, namely the Fair Valuation Suit (in relation to the dispute as to the correct valuation of a piece of land owned by Folin Food). The contributories responded by filing a counterclaim for specific performance which the liquidators were constrained to defend. Additionally the contributories sought to have the liquidators removed *vide* a removal suit. The liquidators were obliged to defend this claim too. In the course of defending the various other claims that arose as a consequence of the Fair Valuation Suit the liquidators had to obtain legal advice on the defences they were to adopt against these claims by the contributories. Legal fees were incurred. The quantum of these fees ballooned considerably in light of the numerous appeals that arose from each order of court that transpired. It was these legal costs that comprised the substantive part of the dispute between all parties. The liquidators maintained that they were constrained to initiate and defend the above suits in the interests of the company in liquidation. The contributories on the other hand, claimed that the quantum of costs sought to be recovered was exorbitant and that no prudent and reasonable professional would have incurred such extravagant sums. The contributories also complained that the joint liquidators breached s. 237(1) of the Companies Act 1965 which requires them to have regard to the wishes of creditors and contributories.

Held (allowing application):

(1) In relation to the additional sum of RM250,000 each which the joint liquidators sought given the length of time of the liquidation, the various and protracted suits that were instituted and the form of allegations and complaints that they were constrained to defend during the entirety of the liquidation from the time of the first valuation of the land, in order to grant such additional fees, there ought to be some basis or entitlement that anchors any such award. In the absence of any agreement or statutory entitlement it was difficult for the court to justify the payment of such an additional sum. The situation in the instant case, while perhaps more hostile than in most other instances, was by no means a rarity. The fees provided for by statute under the Companies (Winding-Up) Rules 1972 provide the basis for the quantum

of fees a liquidator is entitled to. To simply add a further RM250,000 each or RM500,000 in total to the fee for 'pain and suffering' would be anomalous to the current precedents for compensation for liquidators apart from running awry of Schedule C. Accordingly this claim by each of the liquidators was dismissed. (para 42)

(2) None of the suits commenced or defended by the joint liquidators warranted an application of the principle that the liquidators should be made personally liable for the costs incurred thereby because they failed to act reasonably. On the contrary, the various judgments and the appeals spawned as a consequence of the Fair Valuation Suit all went to show that the liquidators were justified in their actions. To that extent, there was no reason to penalise them by denying them the ability of making claim for such costs out of the assets of the company. The legal fees incurred by the liquidators in the sum of RM1,258,922.11 was to be paid by the contributories towards settlement of these bills before a permanent stay was granted. (para 52)

(3) It was not in dispute that all creditors would be paid prior to the grant of a stay, after the advertisement exercise was undertaken. Provided the creditors were paid in full, this issue did not comprise a bar to the grant of an order for a stay under s. 243. (para 62)

(4) In relation to the payments due to the Inland Revenue Board ('IRB') and the Companies Commission of Malaysia ('CCM'), since at that moment there was no claim from the IRB nor fine by the CCM, the contributories were directed to provide the joint liquidators with a suitably worded indemnity in respect of these two issues as a condition precedent to the stay under s. 243 to take effect. (para 66)

(5) It is very much a matter of discretion for a court on the application of a contributory (or liquidator or official receiver or any creditor) to grant such a stay. The principles which govern the court in the exercise of its discretion are as set out in *Re Telescriptor Syndicate Ltd* by Buckley J. A court, in exercising its jurisdiction under s. 243, should as far as possible act upon the principles which are applicable in

exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual; (*Vijayalakshmi Devi Natchatiram v. Dr Mahadevan Nadchatiram & Ors;* refd). (para 71)

(6) The court will not act simply because all the creditors assent to such an annulment. The court must consider whether the permanent stay is proposed for the benefit of the creditors. It must also consider whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. The court will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation. (para 72)

(7) The court granted a conditional stay which was to come into effect automatically upon the requisite payments being made in full and the indemnity being provided as ordered. In the event these conditions were not satisfied, the stay under s. 243 would not come into effect. (para 78)

Case(s) referred to:
Bacich v. Australian Broadcasting Corporation [1992] 29 NSWLR 1 ***(refd)***
Re Bolton & Co [1895] 1 Ch 333 ***(refd)***
Re Calgary & Edmonton Land Co Ltd [1975] 1 WLR 355 ***(refd)***
Re Marseilles Extension Railway and Land Co, Smallpage's and Brandon's cases (1885) 30 Ch D 598 ***(refd)***
Re Staffordshire Gas & Coke Co [1893] 3 Ch 523 ***(refd)***
Re Telescriptor Syndicate Ltd [1903] 2 Ch 174 ***(foll)***
Re Wilson Lovatt & Sons Ltd [1977] 1 All ER 274 ***(refd)***
Re W Powell & Sons [1896] 1 CH 681 ***(refd)***
Sichell's Case (1867) 3 Ch App 119 ***(refd)***
Van den Hurk v. R Martens & Co Ltd [1920] 1 KB 850 ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 237(1), 243
Companies (Winding-Up) Rules 1972, r. 173

Other source(s) referred to:
Buckley's Companies Acts, 13th edn, 1957
Halsbury's Laws of England 7, 4th edn, para 1133

(Winding-up Petition No: 66-1980 (stay application))
For the petitioner/applicants - Bill Davidson (Michael Chow & Derek Chong with him); M/s Michael Chow

For the respondents/liquidators - Fiona Bodipalar (Simon Hong with her); M/s Donny & Hong
For the opposing creditor, Folin Food - CM Owee; M/s Owee & Ho
Arthur Wang; M/s Arthur Wang, Lian & Assocs
PH Cheah; M/s Raja Eleena Siew Ang & Assocs
For Jabatan Insolvensi Malaysia - Asrul Nizam

(Civil Suit No: D-22NCC-674-2009 (fair valuation suit))
For the plaintiffs - Fiona Bodipalar (Simon Hong with her); M/s Donny & Hong
For the 1st defendant - CM Owee; M/s Owee & Ho
For the 3rd, 4th & 5th defendants - Bill Davidson (Michael Chow & Derek Chong with him); M/s Michael Chow

(Petition No: 26NCC-61-04-2012 (181 petition))
For the petitioners - Bill Davidson (Michael Chow & Derek Chong with him); M/s Michael Chow
For the 2nd & 3rd respondents - Fiona Bodipalar (Simon Hong with her); M/s Donny & Hong
For the 4th respondent - CM Owee; M/s Owee & Ho
For the opposing creditor - Jagjit Singh; M/s Putra Gill

Reported by Amutha Suppayah

JUDGMENT

Nallini Pathmanathan J:

[1] The legal history pertaining to the respondent ('Folin Brothers') since it was wound up on 8 April 1987 has been protracted, complex and hostile. A brief summary of this legal history will be considered as part of the background facts. For the purposes of the present decision however the primary issue before this court relates to the grant of a permanent stay of the winding up under s. 243 of the Companies Act 1965. The various parties involved in the present application include:

(a) In this petition, namely 28-66-80: the petitioner, Wong Kee Chong, the joint liquidators, namely Ng Pyak Yeow and Khoo Peng Lai, Folin Brothers' sole asset, namely the shares in Folin Food Processing Sdn Bhd ('Folin Food') and the Director-General of Insolvency;

(b) In petition No. 26NCC-61-04-2012 which is a s. 181 or oppression petition: Wong Sin Fan and Wong Kee Sang, the contributories of Folin Brothers.

[2] The parties have agreed in principle that they will support the contributories', (ie, the petitioner and his brothers, namely Wong Sin Fan and Wong Kee Sang's) application for a permanent stay under s. 243 of the Companies Act 1965, provided the following matters are addressed:

(a) The liquidators' remuneration is paid;

(b) The fees of the lawyers appointed by the liquidators' (past and present) are paid; and

(c) The creditors of Folin Brothers are paid.

[3] The primary dispute relates to the quantum of payments to be made by way of fees for (a), (b) and (c).

[4] Item (a) is readily resolved as the liquidators remuneration is premised on Schedule C of the Winding Up Rules 1972, save for one item relating to fees sought for the distress and anxiety alleged to be suffered by the joint liquidators during the course of the liquidation largely due to the hostile relationship between the parties.

[5] Similarly item (c) is similarly readily resolved because the list of creditors of Folin Brothers is not in dispute. The contributories have no objection to the creditors of Folin Brothers being paid the sums due to them in order to facilitate the grant of the permanent stay.

[6] It is fundamentally item (b), namely the fees of lawyers appointed by the liquidators during the course of the protracted and litigious liquidation that is very much in issue and which requires adjudication.

[7] As this matter has been protracted, parties have also agreed that the decision of this court on the quantum of payments shall be final and non-appealable.

Background Facts

[8] I adopt the salient background facts, which must necessarily be considered, from the submissions of learned counsel for the contributories as well as the joint liquidators.

[9] Folin Brothers was ordered to be wound up on 8 April 1987. The present liquidators, namely Ng Pyak Yeo and Khoo Peng Lai were appointed as joint liquidators of Folin Brothers on 13 March 1997. They are the third set of joint liquidators appointed.

[10] The contributories of Folin Brothers include Wong Sin Fan @ Wong Kon Loong, Wong Kee Sang and the petitioner, Wong Kee Chong ('the Wong brothers'). Each of these three brothers holds 25% in Folin Brothers, totalling 75%. The remaining contributories comprises the estate of Wong Foh Lin (deceased) and his son, Wong Boon Sun, who is now an undischarged bankrupt and who collectively hold the remaining 25% shareholding in Folin Brothers.

[11] Folin Brothers only asset is the shares it owns in its subsidiary, Folin Food Processing Sdn Bhd ('Folin Food'). Folin Food in turn has not been in operation for several years. Its only asset is a commercial property known as Lot 16 located off the Federal Highway. Folin Food's only source of income is its rental of Lot 16.

[12] Folin Food has a paid up capital of 1,000,005 shares of which 1,000,000 are held by Folin brothers. The remaining five shares are held by:

(i) The joint liquidators who hold one share each; and

(ii) The Wong brothers who hold one share each.

[13] The board of Folin Food comprises two members namely Ng Pyak Yeow for the joint liquidators and Wong Sin Fan. In 2008, the joint liquidators appointed Khoo Peng Lai as an additional director of Folin Food. As such the joint liquidators enjoy effective control of the board of directors of Folin Food.

[14] The joint liquidators, from their appointment in 1997, inherited numerous protracted legal suits relating to the assets of Folin Brothers and Folin Food. These suits were pursued and over the years culminated in a global settlement on 26 February 2007. At the time, Folin Food's sole asset, ie, Lot 16 was subject to a charge and was facing foreclosure proceedings by the Standard Chartered Bank ('SCB').

[15] The global settlement provided that in consideration of SCB writing off the entire debt claimed and cancelling the personal guarantees of Folin Food's previous directors and discharging the charge over Lot 16, all parties to the settlement agreement abandoned all claims whatsoever that existed against each other at the time.

[16] Lot 16 thus became unencumbered. The liquidators then decided that as Folin Food had been dormant for more than 20 years the best mode of realising the assets of Folin Brothers would be by way of a members' voluntary winding up of Folin Food.

[17] Accordingly a directors' meeting was called for by the liquidators as directors of Folin Food and a resolution passed by a majority (with Wong Sin Fan dissenting) to recommend voluntary liquidation to the shareholders. The Wong brothers objected strenuously to this course of action and they filed an oppression petition *vide* D4-26-74-2008 ('the first oppression petition') seeking relief against the oppression of minority shareholders. The respondents to the s. 181 petition were Folin Food and the joint liquidators. They also sought to injunct the proposed extraordinary general meeting. The first oppression petition was amicably resolved and a consent order was recorded on 4 June 2009. ('the consent order').

[18] Under the terms of the consent order of 4 June 2009 Ernst & Young were appointed as experts to value the shares of Folin Food with a view to the Wong Brothers purchasing the shares of Folin Food from Folin Brothers. It was envisaged that upon the ascertainment of a 'fair price' a sale and purchase agreement would be entered into by the relevant parties.

[19] Ernst & Young, pursuant to the consent order produced a valuation report which valued the shares of Folin Food at RM2.9 million ('first valuation').

[20] The joint liquidators were unhappy with this valuation, primarily because it appeared to them that the valuation of the property had been less than objective and that the land was consequently undervalued. Accordingly they unilaterally commenced an action in Kuala Lumpur High Court *vide* Suit No: D-22NCC-674-2009 ('the fair valuation suit'), essentially seeking to set aside the first valuation. The joint liquidators together with Folin

Brothers were the plaintiffs, while the defendants to this suit were the Wong brothers (including the petitioner) and Folin Food (as a nominal party). The Wong brothers in turn responded by counter-claiming in the fair valuation suit for specific performance of the consent order on the basis of the first valuation as well as the removal of the joint liquidators ('the first removal application').

[21] In the High Court the liquidators' primary claim under the fair valuation suit was dismissed and the counter claim by the Wong brothers allowed. The decision of the High Court was however reversed by the Court of Appeal in favour of the joint liquidators. The leave application to the Federal Court filed by the Wong brothers was dismissed. The net result of the fair valuation suit therefore was that the first valuation undertaken by Ernst & Young was found to be unsatisfactory.

[22] Ernst & Young therefore undertook a second valuation. However this second valuation was also the subject of litigation in court and could only take place after appeals had been lodged by the liquidators to the Court of Appeal. The costs and fees incurred in the course of this litigation forms the primary focus of the dispute between the parties. The joint liquidators maintain that they had no choice but to defend these suits and applications which they did successfully.

[23] In essence the joint liquidators first made an application to the High Court for directions to implement the decision of the Court of Appeal. The Court of Appeal had ordered that Ernst & Young appoint another valuer to value Lot 16. The liquidators sought some additional prayers relating to disputed accounts of Folin Food and sought additionally the removal of Ernst & Young and its replacement with another firm of accountants who could instruct a new valuation. The contributories took the view that the joint liquidators were seeking to unreasonably widen the ambit of the consent order reached in the first oppression petition.

[24] Upon hearing the liquidators, the High Court on 21 November 2011 made a limited order directing Ernst & Young to revalue the shares in Folin Food as at 4 June 2009 to be completed by 6 December 2011. The costs and expenses were to be shared equally between the joint liquidators and the contributories. No other orders were made on the prayers sought.

[25] The Wong brothers had sought in that action, the appointment of a receiver and manager but this application was dismissed. Instead the court granted the contributories' alternative prayer that all payments by Folin Food had to be made with the consent of Wong Sin Fan. The joint liquidators appealed against these consequential directions and payment directions. The liquidators' appeal was allowed by the Court of Appeal. Applications for leave by the contributories were subsequently withdrawn in order to facilitate the present course undertaken, namely for a permanent stay of the winding up.

[26] It will be recalled that at the time of the fair valuation suit an application was filed against the joint liquidators seeking to remove them on the grounds of their alleged misconduct in the affairs of Folin Brothers. This application seeking a removal of the joint liquidators was dismissed at first instance and affirmed by the Court of Appeal. Leave to appeal to the Federal Court was granted on the limited question of whether the bills of solicitors need to be taxed under r. 173 of the Companies (Winding-Up) Rules 1972 but this was unsuccessful.

[27] In view of the impasse with the joint liquidators, and given that the original reason for the winding up of Folin Brothers, namely the actions of Wong Foh Lin in the management of the company, were no longer in issue by reason of his death, the remaining contributories decided to file this application for a permanent stay.

[28] Initially the joint liquidators objected to the stay, filing several affidavits in opposition. These affidavits reflected the hostility between the parties. The liquidators complained that they had been unnecessarily burdened by lodgements of false reports and complaints as well as the institution of numerous pointless litigation. They sought for this reason additional remuneration in the sum of RM250,000 each which is a matter of dispute for adjudication here.

[29] As a consequence the Wong brothers filed the second oppression suit *vide* 26NCC-61-04-2012 ('the second oppression suit'). Subsequent to this they also sought in the stay application by way of alternative relief that if the court was not minded to stay the winding up that the joint liquidators be removed on the grounds of the clear hostility between the parties.

[30] All the foregoing suits remain before this court. However if a stay of the winding up petition is allowed then all these suits will be withdrawn by the respective parties. Suffice to state that at present the joint liquidators are prepared to support the application for a permanent stay on condition that all bills, including those of the liquidators themselves and their solicitors, as well as creditors are paid. This would effectively bring the liquidation to a close.

Present Status In This Court

[31] In the interim *vide* orders of this court between 1 June 2012 and 21 September 2012 further directions were given in relation to the valuation of the shares by Ernst & Young under the umbrella of the fair valuation suit. This resulted in the valuation of the shares of Folin Food at RM4,109,207. Upon objections being raised, this court also ordered an alternative valuation based on the exclusion of a set of disputed expenses amounting to RM535,000 from the unaudited financial statements of Folin Food as at 4 June 2009. This court will determine which of the two valuations is to be adopted.

[32] Subsequently on 30 October 2012 a further order of this court was recorded whereby both the liquidators and the Wong brothers agreed to narrow down the issues for determination by this court. These issues, as indicated at the outset centre on the following matters:

(i) The remuneration of the liquidators including their claim for an additional fee by reason of mental anxiety;

(ii) The legal fees incurred in the course of the copious, protracted litigation described above.

[33] The issue of the creditors to be paid is not substantially in dispute as parties accept that for the grant of a stay all creditors' debts have to be satisfied.

(i) The Remuneration Of The Liquidators

[34] It is not in dispute that the computation of the liquidators' remuneration be on the basis of the realisation and distribution of net assets in accordance with Table C, 2nd Schedule to the Companies (Winding-Up) Rules 1972, on the assumption that Folin Brother's shares in Folin Food have been sold and the assets of Folin Brothers distributed.

[35] The Wong brothers have agreed to apply Table C scale for the purposes of computing the joint liquidators' remuneration based on the second valuation, but on the basis of the realisation portion of Table C, as there has been no distribution.

[36] As such the only issue for adjudication by this court is which of the two bases of Ernst & Young's revaluation is to be adopted, namely:

(a) RM4,644,207 on the assumption that expenses in the sum of RM535,000 is excluded from the unaudited financial statement of Folin Food as at 4 June 2009; or

(b) RM4,109.207 on the assumption that expenses in the sum of RM535,000 is not excluded from the unaudited financial statement of Folin Food as at 4 June 2009.

[37] Guidance on how this matter is to be determined may be gleaned from the judgment of the Court of Appeal dated 5 May 2011 where Justice Ramly Ali held, *inter alia*, as follows:

> ...[106] The management report relied on by Ernst & Young constitute draft accounts prepared at the behest of Wong Sin Fan which have been queried, challenged and disputed by the appellants when the same was tabled for discussion at the EGM of Folin Food held on 14 August 2009. The draft 2008 accounts were in dispute as they contained liabilities that were included by the auditors even though they constituted expenses which were not authorised or under dispute. Ernst and Young had failed to take into account a sum of RM535,000 being the difference in the net assets of Folin Food. Such failure renders the valuation prepared not of fair value. The amount is in fact significant as it amounts to 1/6 of the value of the total valuation.

[38] Given the clear views expressed by the Court of Appeal I conclude that the revaluation that excludes the sum of RM535,000 ought to be utilised as the basis from which the computation of the liquidators' fees is computed, namely the valuation amounting to RM4,644,207.

[39] A second issue arises as to whether monies that have been accumulating in Folin Food's bank accounts after the date of the consent order of 4 June 2009, which is extraneous to the value of the shares of Folin Food as revalued by EY ought to be taken into consideration in computing the liquidators' remuneration. This

extra accumulated cash in the banks which currently stands at RM1,542,805.66 arises from the collection of monthly rental in the sum of RM48,000 a month from Folin Food's tenant at Lot 16. This sum increases by RM48,000 each month.

[40] The contributories strongly object to these monies being included in the computation of the liquidator's remuneration contending that this increase in cash does not translate directly into an increase in the valuation of the shares of Folin Food. It is also contended that this issue was raised as an item for direction by the High Court but no order was made in this respect. Therefore the contributories maintain that in the absence of any appeal, it follows that as no directions were given by the High Court in this regard, the liquidators are estopped from seeking to include this cash element in the computation of their fees.

[41] Having considered both parties submissions, it appears to this court that the collection of fees comprises a part of the liquidators' duties in the course of the winding up of Folin Brothers, whose only asset is the shares in Folin Food, and whose only source of income is the collection of rental from its sole asset, namely the building at Lot 16. As it comprises a part of their duty it would appear to be proper and regular to allow the cash element to be included in the computation of their fees. Accordingly the extra accumulated cash from 4 June 2009 up to and until January 2013 is allowed to be included in the computation. As such I concur with the computation provided by the joint liquidators which allows on the basis of this computation for their remuneration according to scale up to 25 January 2013 as being in the sum of RM376,924.35.

[42] The issue then remaining is whether the joint liquidators are entitled to the additional sum of RM250,000 each which they seek, given the length of time of the liquidation, the various and protracted suits that were instituted and the form of allegations and complaints that they were constrained to defend during the entirety of the liquidation from the time of the first valuation of Lot 16. The contributories object vigorously to any such additional payment on the grounds that there is no basis for the same.

[43] It appears to the court that in order to grant such additional fees, there ought to be some basis or entitlement that anchors any such award. In the absence of any agreement or statutory

entitlement it is difficult for the court to justify the payment of such an additional sum. Liquidation regrettably often gives rise to deep hostility and mistrust in many instances. It is not uncommon for contributories or directors and liquidators to evince a deep mistrust and dislike which is often exacerbated by further unnecessary litigation. This gives rise to considerable difficulty for both parties, particularly the liquidators in the carrying out of their duties. The situation in the instant case, while perhaps more hostile than in most other instances, is by no means a rarity. The fees provided for by statute under the Companies (Winding-Up) Rules 1972 provide the basis for the quantum of fees a liquidator is entitled to. To simply add a further RM250,000 each of RM500,000 in total to the fee for 'pain and suffering' would be anomalous to the current precedents for compensation for liquidators apart from running awry of Schedule C. As stated before it would be difficult to justify any such additional payment. Accordingly this claim by each of the liquidators is dismissed.

(ii) Lawyers Fees – Tables 2 And 3

[44] As part of the costs of winding up the joint liquidators seek to reclaim from the assets of the company the entirety of the legal fees incurred during their tenure. As is evident from the chronology of events set out above, the liquidators commenced at their own behest, one suit, namely the fair valuation suit. The contributories responded by filing a counter-claim for specific performance which the liquidators were constrained to defend. Additionally the contributories sought to have the liquidators removed *vide* the first removal suit. The liquidators were naturally obliged to defend this claim too. In the course of defending the various other claims that arose as a consequence of the fair valuation suit the liquidators had to obtain legal advice on the defences they were to adopt against these claims by the contributories. Legal fees were incurred. The quantum of these fees ballooned considerably in light of the numerous appeals that arose from each order of court that transpired. It is these legal costs that comprise the substantive part of the dispute between all parties at this juncture and which remains to be resolved. The liquidators maintain that they were constrained to initiate the fair valuation suit in the interests of the company in liquidation. And they were equally constrained to defend these claims which had been brought against them, but had not been initiated by them,

both at the first instance and on appeal. The contributories on the other hand, maintain that the quantum of costs sought to be recovered is exorbitant and that no prudent and reasonable professional would have incurred such extravagant sums. They complain that there is no evidence that the liquidators sought any fee quotes, or tried to limit the fees in any manner. The liquidators did not have any regard for the limited quantum of funds available when incurring such legal fees. The contributories further complain that the joint liquidators have breached s. 237(1) of the Act which requires them to have regard to the wishes of the creditors and contributories. Succinctly put, they object to the quantum of legal fees which the liquidators seek to recover out of the assets of the company as costs of winding up on the grounds that:

(a) Such fees are exorbitant – the contributories point to the fact that the total legal fees and expenses claimed amount to RM3,307,158.30 (without the remuneration of the joint liquidators). (This is to be contrasted with the second valuation which places the value of the shares of Folin Food at RM4,109,207;

(b) The liquidators are not entitled to visit any fees and expenses incurred in relation to their removal, the oppression suit and the stay of proceedings on the assets of the company. In essence the grievance is that it is the liquidators who pursued these various protracted claims and therefore they ought not to be allowed to make claim for such legal costs from the assets of the company.

The Position In Law

[45] The position in law relating to the recovery of costs, particularly legal expenses, incurred by the liquidator in the course of the liquidation and whether such costs are recoverable from the assets of the company or are payable personally by the liquidators is comprehensively considered in the case of *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 by Oliver J. In that case the liquidator had brought claims against former directors of the company as well as Midland Bank, the debenture holders, based on fraud and fraudulent trading. There was a second suit brought against the bank premised on fraudulent preference. In the course of these proceedings it transpired at an early stage that the claim of fraudulent trading had no merit and that the liquidator was

wholly unable to support the pleaded claim. The claim was therefore abandoned. The second claim against the bank also failed. As a result there was the question of costs to be dealt with in relation to this unsuccessful litigation brought by the liquidator. The liquidator sought to have the costs of these two proceedings to be paid out from the assets of the company on a common fund basis, while the defendants to the suits contended that the costs ought to be borne by the liquidator personally.

[46] Oliver J commenced by quoting from the leading textbook, *Buckley's on the Companies Acts* (13th edn.) (1957):

> The liquidator's personal liability for costs of litigation must be regarded from two wholly different points of view: *viz* (A) as between himself and an adverse litigant, and (B) as between himself and the estate ...

[47] In the instant case we are concerned with (B) namely litigation between the liquidator and the estate. Oliver J who was dealing with (A), then went on to consider the position where costs of litigation were incurred between the liquidator and an adverse litigant. His Lordship then considered the position in (B) thus:

> ... But secondly, as regards the proceedings in the liquidation which the liquidator takes in his own name the reasons given in the cases above referred to, and particularly in the judgment of Kindersley VC. In *Consols Insurance Co. (Official Managers) v. Wood* (1865) 2 Drew & Sm 353, seem as applicable under the present as under the old Acts to shew that where the liquidator is applicant, ie, is in a position equivalent to that of plaintiff, and fails, the proper order is, as between himself and the adverse litigant, that he do pay the costs without prejudice to any application that as between him and the estate they be allowed out of the estate ...

[48] He then set out the position in *Halsbury's Laws of England 7* (4th edn.) at para. 1133:

> Where a liquidator sues or defends actions or other proceedings in the name of the company, he is not a party to the action and cannot be ordered to pay the costs personally but when he is the applicant in proceedings brought by him as liquidator, an order for costs will be made against the liquidator personally, even if he is also the official receiver. If the proceedings in which the order is made are not in the winding up the order may be made without

A prejudice to any application he may make to have the costs allowed out of the assets, or the court may order that he is to be repaid the costs out of the company's assets. *As a general rule the liquidator is entitled to his costs of litigation out of the assets, but he may be deprived of them for making a mistake, or where the proceedings are improperly taken by him, even if sanctioned by the committee of inspection, but it seems that the order depriving him of costs is subject to appeal. Where the liquidator is the respondent in proceedings brought against him as liquidator and is successful the costs should be ordered to be paid out of the assets.*

B

C *So there in these two works is this clear statement of the principles, drawing a clear distinction between the case where the liquidator himself initiates the proceedings and the case where the liquidator has the proceedings initiated against him ...* (emphasis added).

[49] Oliver J. then went on to consider a series of cases including D *Re W Powell & Sons* [1896] 1 Ch 681 at 683, *Sichell's Case* (1867) 3 Ch App 119, *Van den Hurk v. R Martens & Co. Ltd.* [1920] 1 KB 850, *Re Staffordshire Gas & Coke Co.* [1893] 3 Ch 523 at 536, 527, *Re Bolton & Co.* [1895] 1 Ch 333 and *Re Marseilles Extension Railway and Land Co, Smallpage's and Brandon's cases* (1885) 30 Ch E D 598. In the last case Pearson J reasoned as follows:

If the practice of the Court shall be changed, and I am told by the Court of Appeal that all liquidators who resist any claim are to be made personally responsible for costs, I shall bow to the authority, as I shall bow to any other decision that may be made F by a superior Court. But as far as I know the practice, the practice has not been to make the liquidator liable. And I conceive that it might render it almost impossible to wind up any company if such a practice were to be established, because the result would be, that except in cases where the assets were very large indeed, G no liquidator would choose to resist a claim brought against a company, without the authority of the Judge, and without being indemnified from all personal liability for costs in case of the claim being successful. I cannot imagine how any Judge at Chambers is to deal with an application for such authority, and tell the liquidator whether he is to resist a claim or whether he is to H bring forward a claim, or to determine before a claim is argued whether or not the liquidator ought or ought not to be indemnified. It seems to me that such a practice would simply tie up all proceedings in Chambers, and make all windings-up in this Court absolutely impossible. [He went on to say:] ... *that the* I *liquidator should be considered to represent the company, and that the costs should be given in the same way in which they would be given if*

the company were defendants, leaving the Court the authority which it now possesses in all proper cases if the liquidator disregards his duty, and throws upon the parties costs which ought not to throw upon them, to make the liquidator personally responsible for such dereliction of his duty. (emphasis added).

[50] Finally Oliver J concluded as follows:

... I think that a review of the authorities does disclose that a clear dichotomy between the case where the liquidator is sued and the case where the liquidator initiates proceedings, is established, and indeed it seems to me to be a perfectly reasonable one. I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court. To subject them to costs and as against whom it is clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A trustee or a personal representative who institutes proceedings no doubt has a right to an indemnity out of the estate which he represents but, if he litigates he litigates at his own risk and so, in my judgment, it should be with the liquidator and the authorities which point that way seem to me, if I may say so respectfully to be completely reasonable.

I can quite see that there may be very powerful reasons of policy for a rule that a liquidator, when carrying out his functions and thus subjecting himself to the possibility of proceedings against him by parties who are discontented with the way in which he has carried out those functions, must be entitled to defend himself without being subjected to the risk of having costs awarded against him personally, because of course he cannot protect himself against claims being made. Unless there were some such rule it might be very difficult to get persons to take on the heavy responsibility of the liquidation of companies. It seems to me that it is quite a different matter where the liquidator himself takes it on himself to institute proceedings, whether they be proceedings in the winding-up or otherwise. In fact of course any other proceedings would be proceedings in the name of the company where, in the ordinary way, the litigant on the other side could get security for costs under the provisions of the Companies Act ...

[51] Applying the foregoing to the present case it is evident that:

(i) The fair valuation suit was initiated by the liquidators in the name of the company at their own behest. It is evident from the judgment of the High Court and the appellate courts that the liquidators were commended for bringing the suit in the interests of the company. Their actions were found to be reasonable. The liquidators were found to be entirely justified in bringing the fair valuation suit. As such they ought not to be penalised in terms of having to bear costs personally in a case where such a suit was necessary to protect the interests of the company. The liquidators succeeded in their claim there;

(ii) The counter-claim in the fair valuation suit was brought by the contributories in an attempt to have their valuation of the property maintained and to have the liquidators accept the same by seeking an order for specific performance. The liquidators were constrained to defend this counter-claim and it therefore cannot be said that they initiated this suit arbitrarily or with no reasoned basis;

(iii) The first removal suit was also initiated by the contributories in an attempt to have the liquidators removed but this too failed. This too is not an instance where the liquidators initiated proceedings, but instead defended the same.

[52] In these circumstances it appears to this court that neither the fair valuation suit which the liquidators successfully initiated, nor the other suits which the liquidators defended warrant an application of the principle that the liquidators should be made personally liable for the costs incurred thereby because they failed to act reasonably. On the contrary the various judgments and the appeals spawned as a consequence of the fair valuation suit all go to show that the liquidators were justified in their actions. To that extent there appears to be no reason to penalise them by denying them the ability of making claim for such costs out of the assets of the company.

[53] I am further fortified in so concluding by the case of *Bacich v. Australian Broadcasting Corporation* [1992] 29 NSWLR 1 at 11 where Brownie J held *inter alia*:

> ... Similarly in *Gray v. Bridgestone Aust Ltd* (1986) 10 ACLR 677; 4 ACLC 330, Cox J. when considering whether a liquidator could recover his costs of bringing certain proceedings on behalf of the company, in effect at the expense of the creditors of the company, held that the liquidator was not obliged to seek the authority of the court beforehand, or of the committee of inspection, or of a resolution of creditors; he was, however, obliged to make the relevant decisions with the skill and care that were appropriate to his office, that is, commensurately with his powers and responsibilities; and that in exercising that judgment or discretion he must act reasonably, the reasonableness of any conduct depending on the circumstances. In contemplating bringing proceedings on behalf of the company, he ought to weigh the costs involved against the amount sought to be recovered, and in deciding whether to examine former officers of the company under oath before commencing proceedings, he ought to weigh up the costs involved in that examination against the amount sought to be recovered in the ultimate proceedings. He ought also to take appropriate legal advice. However, the court will not deprive a liquidator of his costs just because the litigation proves unsuccessful: something more is required, before this happens, such as misconduct or negligence. That is, generally speaking, it is for the liquidator to decide, upon proper grounds, what litigation he or she might bring.

[54] On a consideration of the entirety of the factual matrix therefore it appears that in the instant case the general principle is applicable, namely that the liquidators are entitled to look to the assets of the company for the repayment of their costs, such costs including the remuneration payable to solicitors they were constrained to appoint, largely to defend the several suits and appeals initiated by the contributories. Their initiation of the fair valuation suit, as I have said above, was found to be justified at several levels. The liquidators are therefore entitled to be reimbursed from the assets of the company for the costs incurred in the numerous legal suits initiated or defended in the course of the liquidation.

Quantum Of Costs Payable To Solicitors And Advocates On A Solicitor Client Basis From The Assets Of The Company In Relation To All Litigation Initiated Or Defended By The Liquidators During The Course Of The Liquidation

[55] Having so concluded however, the matter does not end there. The more difficult question of the quantum of costs payable to the several sets of advocates and solicitors who acted on behalf of the liquidators in the foregoing suits during the course of this liquidation remains in issue.

[56] To facilitate matters I asked that counsel condense into tabular form the detailed particulars relating to each suit, as well as the work done by the advocates and solicitors with the quantum of fees so claimed.

[57] The net result is a document termed 'summary of lawyers' invoices/bills' which in turn comprises:

(i) Table 1: Invoices/bills which have been agreed upon;

(ii) Table 2: Invoices/bills which are not agreed to by the contributories on principle and quantum, but which, for the purposes of settlement, the contributories have proposed to pay 20% of the total of each of these legal bills;

(iii) Table 3: Invoices/bills which are not agreed by the contributories on principle and quantum. The contributories are not agreeable to pay any part of these costs on the basis that the same ought not to have been incurred.

[58] Given this clear summarisation of the various legal bills involved it then fell upon the court to undertake an assessment of the quantum of costs payable in a rough and ready way, based on the particulars cited, the time spent, the difficulty of the law involved etc. It amounted in effect to a taxation of legal costs on an estimated basis, bearing in mind that the parties are inclined to have this matter resolved expeditiously in the interest of all parties.

[59] I therefore undertook an examination of each invoice in Tables 2 and 3 and assessed whether firstly, payment was necessitated and secondly the quantum of such payment with simple reasons accorded to each invoice. It must be emphasised that based on the position in law which I have considered in some

detail above, it was clear to me that the liquidators were entitled in principle to be reimbursed from the assets of the company for the costs so incurred, provided that such costs were reasonable and justified. The quantum however was open to assessment which I duly undertook.

[60] Reference is made to the summary of lawyers' invoices and bills in tabular form marked 'T1' which sets out the quantum assessed as being payable as legal fees incurred by the liquidators in the course of the liquidation. It amounts to a total of RM1,263,468.11 (Ringgit Malaysia One Million Two Hundred Sixty Three and Four Hundred Sixty Eight and Eleven Cent only).

[61] It follows that the legal fees incurred by the liquidators in the sum of RM1,258,922.11 is to be paid by the contributories towards settlement of these bills before a permanent stay is granted.

Creditors Of Folin Brothers Sdn Bhd

[62] This issue is not largely in dispute because parties have agreed that an advertisement is to be placed calling for all creditors of Folin Brothers to file their proofs of debt such that they are paid prior to the grant of a permanent stay. In the last proof of debt exercise there were only the following creditors who submitted proofs:

(i)	Wong Sin Fan (contributory)	–	RM194,000
(ii)	Wong Voon Ten	–	RM3,343.50
(iii)	Wong Nyeon Thiat	–	RM1,000
(iv)	Syarikat Ban Foong Electrical	–	RM9,272.04

[63] It is not in dispute that all creditors will be paid prior to the grant of a stay, after the advertisement exercise is undertaken.

[64] Provided the creditors are paid in full, this issue does not comprise a bar to the grant of an order for a stay under s. 243 of Companies Act 1965.

A **Payments To The Inland Revenue Board And The Companies Commission Of Malaysia**

[65] The primary issue for resolution between the parties are sums which the liquidators maintain must first be paid to the
B Inland Revenue Board and the Companies Commission of Malaysia in a total sum of RM613,000. Alternatively the liquidators maintain that tax clearance must be obtained for this sum together with a payment of a compound fine in the sum of RM66,000 to the Companies Commission of Malaysia. The contributories
C maintain that they are ready to provide the joint liquidators with a suitably worded indemnity in respect of these matters.

[66] Having considered the matter, and given that there is presently no claim from the Inland Revenue Board nor fine by the Companies Commission of Malaysia, the contributories are
D directed to provide the joint liquidators with a suitably worded indemnity in respect of these two issues only. The provision of such an indemnity is a condition that has to be fulfilled prior to the stay under s. 243 taking effect. In other words, provided an indemnity as stated is provided by the contributories to the joint
E liquidators, this issue is no bar to the grant of a permanent stay.

Proof Of Debt Filed By Solicitors

[67] Sometime after the substantive hearing of this matter, this
F court was advised that a proof of debt had been filed by the firm of M/s Putra Gill in the sum of RM404,637.05 (Ringgit Malaysia Four Hundred and Four Thousand Six Hundred and Thirty-Seven and Five Cent Only). The liquidators having considered the same have approved the claim. However the contributories have, on
G 12 November 2013, filed an appeal against the decision of the liquidators in approving this debt. In other words, the contributories dispute the validity of this decision in approving the said debt. This matter is therefore pending determination.

H **[68]** In order however, not to further delay these entire proceedings, it has been agreed that the sum of RM404,637.05 is to be retained by M/s Azman Davidson pending the disposal of the appeal against the decision of the liquidators in approving this claim. In the event the appeal fails, the monies will then be
I available to M/s Putra Gill who currently stand as creditors in respect of this sum. If the appeal is successful then the monies

held to be due to M/s Putra Gill will be made payable to them by the stakeholders, and the remaining balance released to the contributories. This arrangement allows the issue of a stay under s. 243 to proceed as any potential liability arising from this claim is secured. This issue does not therefore impede the grant of a stay under s. 243 of the Companies Act 1965.

[69] As most matters have been resolved it remains to be considered whether a grant of a permanent stay ought to be ordered. Given the spirit of the current process which has been put in place so as to effect a final resolution of all matters so as to facilitate a permanent stay, it would appear to be in order to allow such a stay provided that all payments as set out herein are paid in full and that the requisite indemnity is given as stated above.

Principles Governing The Grant Of Permanent Stay Under s. 243

[70] As most matters have been resolved it remains to be considered whether a grant of a permanent stay ought to be ordered. Given the spirit of the current process which has been put in place so as to effect a final resolution of all matters so as to facilitate a permanent stay, it would appear to be in order to allow such a stay provided that all payments as set out herein are paid in full and that the requisite indemnity is given as stated above.

[71] The oft-cited case of *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493 is instructive. I do not propose to reproduce the passage here but suffice to reiterate that it is very much a matter of discretion for a court on the application of a contributory (or liquidator or official receiver or any creditor) to grant such a stay. However it should be proved to the court's satisfaction that such a stay ought in fact to be granted. The principles which govern the court in the exercise of its discretion are as set out in *Re Telescriptor Syndicate Ltd.* [1903] 2 Ch 174 by Buckley J when dealing with a section in the then Companies Act in England, similar to our s. 243. It was held that a court, in exercising its jurisdiction under s. 243, should as far as possible act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual.

[72] The court will not act simply because all the creditors assent to such an annulment. The court must consider whether the rescission or annulment, and as extrapolated to the current situation - whether the permanent stay is proposed for the benefit of the creditors. It must also consider whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large.

[73] As stated in *Palmer's Company Law*, the court will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation.

[74] Finally in *Re Calgary & Edmonton Land Co Ltd* [1975] 1 WLR 355 Megarry J also dealt with the persons whose interest the court had to consider on an application for a stay:

> ... there are plainly three categories to consider. First, there are the creditors ... Second there is the liquidator ... Third there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding-up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets and each should be protected against the destruction of that right without cause.

[75] In the instant case the only remaining member to be considered is Wong Boon Sun who is bankrupt. His interests were represented throughout this hearing by the official receiver. In so far as his interests are concerned, his entitlement or share is to be made over the official receiver.

[76] Accordingly this issue also does not comprise a bar to the grant of a permanent stay.

Conclusion

[77] Having heard the parties at some length and having appraised all claims, I am satisfied bearing in mind the criteria I have cited above that such a stay is in the interests of the creditors, the joint liquidators, the members and will not be detrimental to commercial morality.

[78] Accordingly it is hereby ordered that provided all the payments stipulated in this judgment are paid to the creditors (including solicitors fees as taxed) and the requisite indemnity is provided by the contributories as set out in this judgment within one month from today, ie, 15 November 2013, the respondent is entitled to a permanent stay under s. 243. For avoidance of doubt, the order of this court amounts to a conditional stay which is to come into effect automatically upon the requisite payments being made in full and the indemnity being provided as ordered. In the event these conditions are not satisfied, the stay under s. 243 will not come into effect.

A

B

C

D

E

F

G

H

I